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Oil and the National Security: CNOOC's Failed Bid To Purchase Unocal

On August 2, 2005, the China National Offshore Oil Company ("CNOOC") withdrew its bid to purchase U.S. oil company Unocal in response to significant political opposition.[1] CNOOC's bid aroused intense opposition from Members of Congress and outside observers. Within weeks of the bid's announcement, the House of Representatives urged the Bush administration to review the bid on national security grounds.[2] The House based its arguments on the Exon-Florio Amendment to the Omnibus Trade and Competitiveness Act of 1988 (the "Amendment"),[3] legislation designed to provide for the review and restriction of foreign direct investment in U.S. companies that threatens to impair national security.[4] In calling for review of the Unocal bid, Congress cited numerous concerns over the proposed acquisition, many of them based more on economic matters than threats to national security.[5]

This Recent Development examines these concerns and concludes that while the CNOOC-Unocal purchase bid was problematic in some respects,[6] any ultimate decision to use the Exon-Florio Amendment to block the sale based on the congressional arguments would not have been valid in light of the Amendment's purpose and design. This Recent Development begins by discussing CNOOC's bid to purchase Unocal and the intense opposition it generated, particularly the congressional concerns expressed in

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1. *See* David Barboza & Andrew Ross Sorkin, *Chinese Company Drops Bid To Buy U.S. Oil Concern*, N.Y. TIMES, Aug. 3, 2005, at A1.

2. H.R. Res. 344, 109th Cong., 151 CONG. REC. H5570 (2005) (enacted) ("[I]t is the sense of the House of Representatives that ... [CNOOC] could take action that would threaten to impair the national security of the United States ....").

3. Pub. L. No. 100-418, 102 Stat. 1425 (1988) (codified as amended at 50 U.S.C. app. § 2170 (2000)).

4. *See id.*; H.R. Res. 344 ("Whereas ... the President [is authorized] to suspend or prohibit any foreign acquisition, merger, or takeover of a United States corporation that threatens the national security of the United States."). Foreign direct investment is the ownership of assets of an entity by residents of a foreign country to the extent that the residents of the foreign country can exert control over the entity. *See* EDWARD M. GRAHAM & PAUL R. KRUGMAN, FOREIGN DIRECT INVESTMENT IN THE UNITED STATES 8 (3d ed. 1995).

5. *See* H.R. Res. 344; *see also infra* notes 39–43 and accompanying text (discussing the economic factors animating Congress's call for review).

6. *See infra* notes 109–21 and accompanying text.

House Resolution 344 (the "Resolution"). The piece then examines the Exon-Florio Amendment, focusing on the five criteria the Amendment suggests the President should consider when determining if a proposed acquisition would threaten to impair national security. The discussion then turns to a comparison of the concerns expressed in House Resolution 344 with the five Exon-Florio criteria and the circumstances of the only case where the Amendment was used to prohibit the foreign acquisition of a U.S. company. This case study and application of the Amendment's suggested criteria illustrate that an Exon-Florio block of the CNOOC-Unocal purchase bid would have been an improper use of the Amendment. Although the terms of the Exon-Florio Amendment would not have justified prohibiting this acquisition as a national security threat, the Chinese government's majority ownership and subsidization of CNOOC presented a valid cause for concern in this instance given CNOOC's access to the Chinese government's resources and the competitive disadvantage created for competing bidders. This Recent Development concludes by discussing this concern and suggesting measures that could address these issues while still encouraging foreign confidence in investment in the U.S. market.

CNOOC was not the first company to make an offer for Unocal. Chevron, a privately-owned U.S. oil company, made an offer worth $16.8 billion of cash and stock on April 4, 2005.[7] On June 23, 2005, CNOOC followed suit with an unsolicited, $18.5 billion all-cash bid for Unocal[8]—almost $2 billion more than the Chevron bid. The CNOOC bid promptly attracted attention in Washington not because of its dollar amount, but because the Chinese government held a seventy percent share in CNOOC.[9] On June 30, 2005, the House of Representatives approved House Resolution 344,[10] urging the President to review the bid as a national security threat pursuant to

7. *See* Barboza & Sorkin, *supra* note 1. Chevron ultimately raised its bid to $17 billion in cash and stock. *Id.*

8. *Id.*

9. *See* H.R. Res. 344 ("Whereas the People's Republic of China owns approximately 70 percent of CNOOC . . . ."); *see also* Ben White, *Chinese Drop Bid To Buy U.S. Oil Firm*, WASH. POST, Aug. 3, 2005, at A1 (stating that Members of Congress opposed CNOOC's bid in part because CNOOC "benefited from sweetheart financing from the Communist government in Beijing"). This was one of a string of attempted acquisitions of foreign companies by Chinese corporations since the Chinese government began encouraging the purchase of foreign companies to ensure the availability of sufficient raw materials to supply Chinese industrialization. Peter S. Goodman, *China Tells Congress To Back Off Businesses*, WASH. POST, July 5, 2005, at A1.

10. H.R. Res. 344.

the Exon-Florio Amendment.[11] The Resolution's justifications for a national security review focused on the economic repercussions of the proposed acquisition, the Chinese government's ownership of a majority share of CNOOC, and the petroleum industry's use of sensitive technologies for oil exploration and production.[12] On July 13, 2005, Representative Duncan Hunter threatened to introduce legislation to directly block the sale as a national security threat.[13]

The pressure proved too great for CNOOC. On August 2, 2005, CNOOC withdrew its bid for Unocal after months of sustained political opposition.[14] CNOOC blamed its retreat on the difficulty it was having in determining its chances for success in acquiring Unocal.[15] The Chinese firm apparently found that its purchase bid had become too time consuming and risky for it to continue its pursuit of Unocal.[16]

A large portion of this risk stemmed from the possibility that the President would block the bid pursuant to his authority under Exon-Florio. Congress passed Exon-Florio in response to several acquisitions of domestic technology firms by foreign investors in the 1980s.[17] The Amendment provides a mechanism for the President to

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11. *Id.* Instead of waiting for the inevitable, CNOOC tried to save some time by filing a notice with the Committee on Foreign Investments in the United States, requesting an expedited Exon-Florio review. *See* Jad Mouawad, *Chinese Company Asks U.S. To Review Its Bid for Unocal*, N.Y. TIMES, July 2, 2005, at C4. CNOOC was apparently trying to gain approval for the bid prior to August 10, 2005, when Unocal shareholders would vote on the Chevron bid. *Id.* If CNOOC had received approval of its bid prior to the Chevron vote, Unocal shareholders would have been more likely to vote down the Chevron bid in the hope of receiving greater profits from the larger CNOOC bid. *See id.*

12. *See* H.R. Res. 344. The majority of the criticisms levied against the proposed purchase focused on possible economic repercussions from the Chinese acquisition of Unocal. *See id.* China criticized the House's arguments, claiming that Congresspersons were injecting politics into what should have been a purely business matter. Goodman, *supra* note 9 (noting the Chinese Foreign Ministry's assertion that "CNOOC's bid to take over the U.S. Unocal company is a normal commercial activity between enterprises and should not fall victim to political interference").

13. *See* Steve Lohr, *Unocal Bid Denounced at Hearing*, N.Y. TIMES, July 14, 2005, at C1.

14. Press Release, CNOOC Ltd., CNOOC Limited To Withdraw Unocal Bid (Aug. 2, 2005) (on file with the North Carolina Law Review), *available at* http://www.cnoocltd.com/press/channel/press1616.asp.

15. *See id.* ("This political environment has made it very difficult for us to accurately assess our chance of success, creating a level of uncertainty that presents an unacceptable risk to our ability to secure this transaction.").

16. *See id.*

17. *See* Barry K. Robinson, *Practical Comments on the Exon-Florio Provisions and Proposed Regulations*, *in* THE COMMERCE DEPARTMENT SPEAKS 1990: THE LEGAL ASPECTS OF INTERNATIONAL TRADE 173, 179 (Practising Law Inst. ed., 1990) (citing concerns over the "rapidly increasing number of foreign acquisitions of U.S. firms engaged

review and restrict foreign direct investment in any entity engaged in interstate commerce in the United States upon credible evidence that the acquisition threatens to impair national security.[18] Exon-Florio charges the Committee on Foreign Investments in the United States (the "CFIUS")—an interagency committee acting as the President's designee[19]—with conducting investigations of certain foreign acquisitions of domestic companies to analyze any national security implications.[20] A 1992 Amendment[21] makes these investigations mandatory in certain circumstances.[22] The CFIUS must now conduct an Exon-Florio investigation whenever the acquiring party is controlled by or acting on behalf of a foreign government and the acquisition may result in control of a U.S. interest that may affect national security.[23] If the President finds, based on the CFIUS investigation, that the transaction threatens to impair national security, he can suspend or prohibit the transaction.[24] If the parties

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in areas of technology. In some instances that technology is directly or indirectly related to . . . national security.").

18. 50 U.S.C. app. § 2170 (2000).

19. Exec. Order No. 12,661, 54 Fed. Reg. 779 (Jan. 9, 1989) (amending Executive Order 11,858, which established the CFIUS as the President's designee for monitoring the impact of foreign investment in the United States, to grant the CFIUS investigatory authority). President Gerald Ford created the CFIUS by executive order in 1975, Exec. Order No. 11,858, 40 Fed. Reg. 20,263 (May 7, 1979), to conduct "reviews that protect national security while maintaining the credibility of [the U.S.] open investment policy and preserv[e] the confidence of foreign investors here and of U.S. investors abroad that they will not be subject to retaliatory discrimination," Office of International Investment, U.S. Dep't of Treasury, Office of Int'l Inv., Committee on Foreign Investments in the United States (CFIUS), http://www.treas.gov/offices/international-affairs/exon-florio/ (last visited Mar. 28, 2006). Current committee members include representatives of the Secretaries of the Treasury (who serves as the chairman of the committee), State, Defense, Commerce, and Homeland Security; the Attorney General; the Director of the Office of Management and Budget; the U.S. Trade Representative; the Chairman of the Council of Economic Advisers; the Director of the Office of Science and Technology Policy; the Assistant to the President for National Security Affairs; and the Assistant to the President for Economic Policy. *Id.*

20. § 2170(a). Exon-Florio provides that the President or the President's designee can conduct "an investigation to determine the effects on national security of mergers, acquisitions, and takeovers proposed or pending . . . which could result in foreign control of persons engaged in interstate commerce in the United States." *Id.*

21. Pub. L. No. 102-484, 106 Stat. 2463–2465 (1992) (codified at 50 U.S.C. app. § 2170(b) (2000)).

22. 50 U.S.C. app. § 2170(b).

23. *Id.* ("The President or . . . designee shall make an investigation . . . in any instance in which an entity controlled by or acting on behalf of a foreign government seeks to engage in any merger, acquisition, or takeover which could result in control of a person engaged in interstate commerce in the United States that could affect the national security of the United States.").

24. *Id.* § 2170(d).

have completed the transaction, the President can seek a court order directing the foreign investor to divest its holdings in the domestic company.[25] To suspend, prohibit, or order the divestiture of a transaction, the President must specifically find that "there is credible evidence ... to believe that the foreign interest exercising control might take action that threatens to impair the national security."[26] The President must also find that existing laws, except for the Exon-Florio Amendment and the International Emergency Economic Powers Act ("IEEPA"),[27] do not provide adequate and appropriate authority to take the actions required to protect national security.[28] Statutory timelines grant the President up to ninety days to make a final decision.[29] Significantly, the President's findings regarding the acquisition's threat to national security are not subject to judicial review.[30]

While Exon-Florio is designed to protect national security, it does not specifically define this term,[31] making it difficult to determine what types of acquisitions raise national security concerns. The statute does, however, provide some factors that the President may take into account in considering an acquisition's effect on national security:

> (1) domestic production needed for projected national defense requirements,
>
> (2) the capability and capacity of domestic industries to meet national defense requirements, including the availability of human resources, products, technology, materials, and other supplies and services,

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25. *Id.* ("The President may direct the Attorney General to seek appropriate relief, including divestment relief, in the district courts.").

26. *Id.* § 2170(e)(1).

27. Pub. L. No. 95-223, 91 Stat. 1625 (codified at 50 U.S.C. §§ 1701–1706). The IEEPA permits the President to void, prevent, or prohibit a foreign acquisition of a domestic entity during a national emergency arising from an unusual and extraordinary threat to national security, foreign policy, or the U.S. economy. *See id.* The IEEPA is unwieldy because it requires a national emergency declaration, the economic equivalent of a declaration of hostilities against the acquiring company's government. *See* Robinson, *supra* note 17, at 181.

28. § 2170(e)(2).

29. *See id.* § 2170. The CFIUS must begin its investigation within thirty days after notification of the proposed acquisition, and must complete it within forty-five days of commencement. *Id.* § 2170(a). The President must announce his decision based on the CFIUS investigation recommendations within fifteen days of the investigation's completion. *Id.* § 2170(d).

30. *Id.* § 2170(e).

31. *Id.* § 2170.

> (3) the control of domestic industries and commercial activity by foreign citizens as it affects the capability and capacity of the United States to meet the requirements of national security,
>
> (4) the potential effects of the proposed or pending transaction on sales of military goods, equipment, or technology to any country [listed on the Nuclear Non-Proliferation-Special Country List or identified by the Secretary of State as a country that supports terrorism, or as a country of concern regarding missile or biological and chemical weapons proliferation], and
>
> (5) the potential effects of the proposed or pending transaction on United States international technological leadership in areas affecting United States national security.[32]

The Conference Report for the Exon-Florio Amendment also gives some indication of what constitutes "national security." The report states that the term should be "interpreted broadly without limitation to particular industries. The President is authorized to take action under this section with respect to a merger, acquisition, or takeover involving a firm in any industry provided that the facts and circumstances warrant the presidential findings required under this provision."[33] Although this statement indicates that the President can determine that there is credible evidence of a threat to national security even if the acquisition is of a company that is part of an industry not traditionally associated with national security,[34] the proffered guidance does not provide much assistance in determining what constitutes credible evidence.

House Resolution 344 proposed several arguments asserting that the facts of the CNOOC-Unocal situation constituted credible evidence of a threat to national security.[35] Only one of these arguments focused on what many would consider traditional national

32. *Id.* § 2170(f) (stating that the President *may* consider these factors among others).

33. H.R. REP. NO. 100-576, at 926 (1988) (Conf. Rep.), *as reprinted in* 1988 U.S.C.C.A.N. 1547, 1959. At least one commentator argues that the intent was to establish a pornography-type standard of "you'll know it when you see it." Robinson, *supra* note 17, at 185. While this lax standard may suggest that Exon-Florio can be blatantly overused to meet political ends, the President has used the provision only once (out of 1,500 cases filed with the CFIUS) to block a transaction. *See* Mouawad, *supra* note 11.

34. *See* 134 CONG. REC. 8121 (1988) (statement of Rep. Fish) (stating his belief that application of Exon-Florio "is not limited to those industries which develop and produce tanks, rifles and fighter-bombers").

35. *See* H.R. Res. 344, 109th Cong., 151 CONG. REC. H5570 (2005) (enacted).

security concerns.[36] The Resolution observed that the oil industry uses some sensitive technologies for exploration, production, and refining, including technologies that have "dual-use" commercial and military applications.[37] Further, the Resolution reasoned that CNOOC's acquisition of Unocal could give China access to technologies that are otherwise subject to export licensing requirements or could otherwise be restricted for export to China.[38]

The remaining observations focused on economic and oil supply considerations.[39] The Resolution asserted that "oil and natural gas resources are strategic assets critical to national security and the Nation's economic prosperity" and that Unocal's petroleum resources are simply too vital to lose to Chinese control.[40] The Resolution further stated that China's increasing demand for oil is a significant factor driving increases in global oil prices.[41] Finally, the Resolution expressed concern over the possibility that CNOOC would redirect oil produced by Unocal to China, rather than placing the oil into the global market.[42] The Resolution's focus on economic policy and oil supply suggests that national security was not the primary concern in the CNOOC-Unocal situation.[43]

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36. Of the twenty-three observations made in the Resolution, only five addressed possible Chinese acquisition of sensitive technologies. *See id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* ("China's consumption of crude oil is expected to grow by an additional 7.5 percent in 2005, and world oil prices are projected to rise significantly as a result of increasing demand from China for oil."). The House also observed that increasing Chinese demand for crude oil accounted for more than one-third of the 2004 increase in global demand. *Id.*

42. *Id.* Participants in committee hearings also stressed this concern. Several individuals testifying before the House Armed Services Committee claimed that the Unocal purchase bid was essentially part of a Chinese strategic plan for domination of global energy. Frank J. Gaffney, Jr. of the Center for Security Policy argued that the Unocal bid fits into China's long-term strategy of achieving "dominance of strategic energy resources, materials and minerals, [and] technologies." *Full Committee Hearing on the National Security Implications of the Possible Merger Between the China National Offshore Oil Company (CNOOC) and the Unocal Corporation: Hearing Before the H. Armed Servs. Comm.*, 109th Cong. (2005) (statement of Frank J. Gaffney, Jr., President and C.E.O., Center for Security Policy), 2005 WL 1656413 (F.D.C.H.). A former Director of Central Intelligence, R. James Woolsey, testified that "China is pursuing a national strategy of domination of the energy markets and strategic dominance of the western Pacific." Lohr, *supra* note 13.

43. Statements during the House of Representatives floor debate on the Resolution further support this theory. *See generally* 90 CONG. REC. H5570 (daily ed. June 30, 2005) (stating the arguments for and against the Resolution). During these debates, Representatives stressed rising global oil prices and limited supply, the fact that CNOOC

Facts supporting these arguments justify blocking CNOOC's purchase of Unocal only if the President could have found that they constituted credible evidence that the acquisition would threaten to impair national security.[44] This determination requires an examination of the only case in which the President used the Amendment to prevent the foreign acquisition of a U.S. entity. In 1989, the China National Aero-Technology Import and Export Company ("CATIC") purchased MAMCO, Inc.[45] CATIC was an import-export company for the Chinese Ministry of Aerospace Industry.[46] This ministry conducts research and development and engages in the design and manufacture of military and commercial aircraft, aircraft engines, and missile technology for the Chinese government.[47] MAMCO was a privately-owned U.S. firm that manufactured metal aircraft components primarily for the production of civilian aircraft.[48]

After an investigation, the CFIUS recommended disapproval of CATIC's acquisition of MAMCO.[49] Because the parties had already completed the deal, President George H.W. Bush ordered CATIC to divest all its holdings in MAMCO.[50] President Bush told Congress that he believed this action was justified based on classified information about some of CATIC's past activities which raised serious concerns about its intentions with regard to MAMCO.[51] Some reports indicated that this classified information involved CATIC's 1984 purchase of two prototype General Electric engines,

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is majority-owned by the Chinese government, and problems with United States-Chinese trade relations in general. *See id.*

44. *See supra* notes 24–26 and accompanying text.

45. Andrew Rosenthal, *Bush Urged To Void Sale of Airplane-Parts Maker to Chinese*, N.Y. TIMES, Feb. 2, 1990, at A9.

46. President's Message to the Congress on the China National Aero-Technology Import and Export Corporation Divestiture of MAMCO Manufacturing, Inc., 1 PUB. PAPERS 144 (Feb. 2, 1990) [hereinafter President's Message].

47. *Id.*

48. *See id.* Boeing used some of these parts to manufacture military aircraft with commercial counterparts (dual-use aircraft that could be configured for either commercial or military use). *See* Wm. Gregory Turner, Comment, *Exon-Florio: The Little Statute that Could Become a Big Headache for Foreign Investors*, 4 TRANSNAT'L LAW. 701, 724 (1991).

49. *See* W. Robert Shearer, Comment, *The Exon-Florio Amendment: Protectionist Legislation Susceptible to Abuse*, 30 HOUS. L. REV. 1729, 1757 (1993) (noting that the rationale for the CFIUS decision is unclear due to the confidential nature of the Exon-Florio review process).

50. President's Message, *supra* note 46.

51. *Id.* ("It is my determination that this information constitutes the 'credible evidence' required by the statute.").

which the Chinese disassembled to acquire their technology.[52] Administration officials also indicated that President Bush took the action because the Defense Department and intelligence agencies suspected that CATIC purchased MAMCO merely to acquire technology that is regularly restricted for export or might be put to military use.[53] Although some argued that the President's justifications were too weak to support the decision,[54] the CATIC-MAMCO example provides some hints as to what kinds of activities could be considered a national security threat.

Using the CATIC-MAMCO example as a model, it is difficult to argue the propriety of an Exon-Florio block of CNOOC's bid for Unocal. In analogizing these cases, there are clear distinctions between the circumstances and the parties on both sides of these deals. On the seller's side of the deal, the activities of MAMCO and Unocal are quite dissimilar. MAMCO did have *some* military contact due to its products being used by Boeing in certain military aircraft.[55] Unocal, on the other hand, is an oil company with no known military association.[56]

On the bidder's side of the deal, there is a glaring distinction between the business activities of CNOOC and CATIC. CATIC was an import-export agent of the Chinese ministry responsible for development and manufacture of military aircraft and missile technology.[57] CNOOC is an oil company.[58] The contrast therefore, is

52. *See* Andrew Rosenthal, *Bush, Citing Security Law, Voids Sale of Aviation Concern to China*, N.Y. TIMES, Feb. 3, 1990, at 1. The engines reportedly contained high-performance metallurgical technology. *Id.* CATIC apparently ignored U.S. export controls requiring that the Chinese not take the engines apart to harvest their technology. *Id.*

53. *Id.* Interestingly, reports at the time indicated that President Bush's National Security Advisor, Brent Scowcroft, urged the President not to void the sale. *Id.*

54. *See id.* (describing criticism from international trade groups characterizing the decision as a politically motivated use of Exon-Florio in response to growing foreign investment in the United States). The White House stressed that foreign policy considerations did not influence the decision to order the divestiture. *See* President's Message, *supra* note 46 (stating that the United States welcomes foreign direct investment and that the President's action was solely in response to the circumstances of the case).

55. *See supra* note 48 (stating that Boeing used some MAMCO components for the manufacture of military aircraft with commercial counterparts).

56. *See* UNOCAL CORP., 2004 ANNUAL REPORT 2–5, *available at* http://library.corporate-ir.net/library/11/111/111875/items/143257/2004_AR.pdf (discussing Unocal's activities in the energy field which do not include military associations).

57. *See supra* notes 46–47 and accompanying text.

58. *See* CNOOC, Ltd., CNOOC Limited Operations, http://www.cnoocltd.com/Operations/channel/opertions1298.asp (last visited Mar. 28, 2006) (discussing CNOOC's oil exploration and production activities); Reuters, CNOOC Ltd: Company Description, http://www.investor.reuters.com/business/BusCompanyOverview.aspx?ticker=CEO.N&ta

between a company that manufactures specialized equipment and weapons for military applications, and a company that—like many others in the world—harvests and processes oil. The only apparent parallel between these companies is that they are both controlled by the Chinese government.[59] President Bush's justification for ordering the MAMCO divestiture further illustrates the CATIC-CNOOC distinction. The evidence of CATIC's suspect activities with sensitive materials in the past[60] raised credible national security concerns because of CATIC's military function. It would be difficult to make the same argument about CNOOC, which has no known military function or association.[61] Therefore, the CNOOC purchase of Unocal did not pose a threat to national security under the Exon-Florio Amendment. This conclusion finds further support from the five criteria the Amendment suggests the President could consider in making a decision on a proposed acquisition.[62]

The first criterion requires that "domestic production [is] needed for projected national defense requirements."[63] The requirement that domestic production is "needed" rather than simply "used"[64] suggests that Unocal must have been a significant supplier of oil used to meet national defense requirements. Even assuming that the everyday U.S. oil requirement constitutes a national defense requirement, the facts in this situation make it difficult to argue that Unocal's oil production was "needed." Economic experts reported at the time that Unocal's loss would not affect domestic requirements because Unocal's production and reserves are too small to be significant.[65] One expert asserted that the United States should not be concerned about who owns Unocal's oil reserves because those reserves amount

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rget=%2fbusiness%2fbuscompany%2fbuscompfake%2fbuscompoverview&cotype=1 (last visited Mar. 28, 2006) (providing investor's overview of CNOOC).

59. *See supra* notes 9, 46–47 and accompanying text.

60. *See supra* note 52 and accompanying text.

61. *See* CNOOC, Ltd., *supra* note 58 (providing a detailed company overview that fails to mention any association between CNOOC and the Chinese military); Reuters, *supra* note 58 (same).

62. *See* 50 U.S.C. app. § 2170(f) (2000).

63. *Id.* § 2170(f)(1).

64. *Id.*

65. *See* Laura D'Andrea Tyson, *What CNOOC Leaves Behind*, BUS. WK., Aug. 15, 2005, at 101, 101 (citing energy experts as asserting that "there is no reason the U.S. should care who owns a particular oil company if its reserves are too small to influence the world [oil] price"); *CNOOC Drops Its Bid for Unocal*, Economist.com Global Agenda, Aug. 2, 2005, http://www.economist.com/agenda/displaystory.cfm?story_id=S%27%28X%24%28QQ%2F%25%20P%20D%0A&tranMode=none (subscription required) [hereinafter *CNOOC Drops Bid*] (arguing that fears that the sale would foster Chinese oil dominance are unfounded because Unocal is not even in the top forty oil companies in the world).

to only 1.75 billion barrels, while known global oil reserves exceed one trillion barrels.[66] Comparing Unocal's daily production with U.S. daily oil consumption further illustrates this point. Unocal produces an average of 159,000 barrels of oil a day worldwide.[67] In contrast, the Department of Energy estimates that the United States consumes an average of 20.8 million barrels of oil per day.[68] Unocal's daily oil production therefore amounts to only 0.76% of U.S. daily consumption.

Economic experts also argued that even if Unocal were a significant oil producer, concerns over the loss of Unocal's domestic oil production were ill-founded because oil is a global commodity.[69] They asserted that because oil is a global commodity, owning petroleum reserves in the ground does not provide any protection from sudden spikes in oil and gas prices.[70] Energy expert Jerry Taylor testified before the House Armed Services Committee that even if CNOOC's ownership of Unocal resulted in the diversion of Unocal's total oil production to China, it would have no effect on oil supply. Taylor stated that "Unocal production redirected towards China would simply displace imports from other suppliers. Those displaced imports would reenter the world market with no net effect on global

66. *See* Paul Blustein, *Many Oil Experts Unconcerned over China Unocal Bid*, WASH. POST, July 1, 2005, at D1 (citing an energy specialist at the Institute for International Economics).

67. UNOCAL CORP., *supra* note 56, at 2.

68. U.S. Department of Energy, Energy Information Administration's United States Overview, http://www.eia.doe.gov/emeu/cabs/Usa/Profile.html (last visited Mar. 28, 2006). Of the 20.8 million barrels of oil the United States consumes daily, 12.2 million barrels (59%) are imported. *Id.*

69. *See* Lohr, *supra* note 13 (discussing criticism of congressional opposition to the CNOOC bid); Tyson, *supra* note 65 (same).

70. *See* Blustein, *supra* note 66; Lohr, *supra* note 13. One expert used a comparison between oil prices in Britain and Japan during the price increases set off by the Iranian Revolution as an example. During this time, Britain was oil self-sufficient, while Japan depended on imported oil. Even though Britain had its own oil fields, both countries paid the same amount for the oil they used. JERRY TAYLOR, CATO INSTITUTE, WRITTEN TESTIMONY SUBMITTED TO THE HOUSE ARMED SERVICES COMMITTEE: NATIONAL SECURITY IMPLICATIONS OF THE POSSIBLE MERGER OF THE CHINA NATIONAL OFFSHORE OIL CORPORATION WITH UNOCAL CORPORATION (2005), http://armedservices.house.gov/schedules/Taylor7-13-05.pdf. This argument is bolstered by the recent experience with oil prices. As oil prices have steadily risen since the beginning of 2005, the United States has been able to do little to alleviate the price increases. *Oil and the Global Economy: Counting the Cost*, ECONOMIST, Aug. 27, 2005, at 55. These increases have been consistent despite the fact that the United States has significant domestic oil production and a Strategic Petroleum Reserve. *See* U.S. Department of Energy, *supra* note 68 (stating the United States produces 7.5 million barrels per day and has total oil stocks consisting of 1.69 billion barrels).

supply."[71] These arguments make it difficult to maintain that CNOOC's acquisition of Unocal would have been a threat to national security under the "*needed* for projected national defense requirements"[72] criterion.

The second statutory criterion the President may consider is the "capability and capacity of domestic industries to meet national defense requirements."[73] The statute further specifies several factors the President should consider in determining if the United States could bear the loss of a domestic entity including "the availability of human resources, products, technology, materials, and other supplies and services."[74] In Unocal's case, this would not have been a factor because oil is a common commodity.[75] Many other U.S. companies would continue oil production even if CNOOC acquired Unocal and diverted all the oil Unocal produced to China. The Department of Energy lists fifteen major U.S. oil companies as of 2005.[76] At the time of CNOOC's purchase bid, Unocal was only the eighth largest domestic supplier,[77] producing only 58,000 barrels of oil a day in the United States.[78] In contrast, total domestic oil production totals 7.5 million barrels a day.[79] Unocal's domestic daily production amounts to only 0.77% of the U.S. total. Losing Unocal would therefore not significantly affect the capability or capacity of the domestic oil industry to meet national defense requirements pursuant to the second criterion.

The third criterion the President may consider when determining whether to block an acquisition on national security grounds is the "control of domestic industries and commercial activity by foreign citizens as it affects the capability and capacity of the United States to meet the requirements of national security."[80] This should not have

71. TAYLOR, *supra* note 70, at 4. Robert J. Priddle, former executive director of the International Energy Agency, agrees that regardless of what China did with Unocal's oil, "the cost of oil will be set between world supply and demand, and not by arrangements like this." Blustein, *supra* note 66.

72. 50 U.S.C. app. § 2170(f)(1) (2000) (emphasis added).

73. *Id.* § 2170(f)(2).

74. *Id.*

75. *See supra* notes 69–71 and accompanying text.

76. *See* U.S. Department of Energy, *supra* note 68 (listing the top fifteen major U.S. oil companies including Amerada Hess, Anadarko, Apache, BP, ChevronTexaco, CITGO, ConocoPhillips, ExxonMobil, Occidental, Marathon, Shell, Sunoco, Unocal, Valero, and Williams).

77. *CNOOC Drops Bid*, *supra* note 65.

78. TAYLOR, *supra* note 70.

79. *See* U.S. Department of Energy, *supra* note 68.

80. 50 U.S.C. app. § 2170(f)(3) (2000).

been a valid concern in the CNOOC-Unocal transaction. First, oil is a global commodity[81] and is in abundant supply.[82] Second, foreign control of the eighth largest U.S. oil company[83] will not result in control over domestic industries and commercial activity because there are still fourteen other major suppliers.[84] Unocal's loss therefore would not affect United States capability and capacity to meet national security requirements pursuant to this criterion.

The last two criteria the President may consider address situations in which the foreign bidder may acquire military or otherwise sensitive technology from the U.S. company it acquires. The fourth criterion suggests that the President consider "the potential effects of the proposed or pending transaction on sales of military goods, equipment, or technology to any country ... that supports terrorism; ... [is] a country of concern regarding missile proliferation; or ... [is] a country of concern regarding the proliferation of chemical and biological weapons."[85] The final criterion suggests that the President consider "the potential effects of the proposed or pending transaction on United States international technological leadership in areas affecting United States national security."[86]

In trying to make an argument pursuant to these final two criteria, House Resolution 344 stated that the petroleum industry uses some sensitive technologies for oil exploration, production, and refining and that the United States requires licensing or restriction of some of these items upon export to China.[87] It asserted that some of these technologies have dual-use commercial and military applications.[88] The Resolution also expressed the concern that because other Chinese oil companies conduct operations in Sudan and Iran—both of which are on the State Department's list of state sponsors of terrorism[89]—CNOOC could potentially transfer sensitive

81. *See supra* notes 69–70 and accompanying text.

82. *See supra* text accompanying note 66 (stating that global reserves exceed one trillion barrels).

83. *See supra* text accompanying note 77.

84. *See supra* note 76 and accompanying text.

85. § 2170(f)(4).

86. *Id.* § 2170(f)(5).

87. *See* H.R. Res. 344, 109th Cong., 151 CONG. REC. H5570 (2005) (enacted) (including seismic analysis and processing, downhole logging sensors, and modeling software as examples of sensitive technologies for petroleum exploration).

88. *Id.*

89. *See* U.S. Department of State, State Sponsors of Terrorism, http://www.state.gov/s/ct/c14151.htm (last visited Mar. 28, 2006).

technology used by Unocal to these states.[90] Had the CFIUS determined after an investigation that Unocal possessed dual-use technologies that CNOOC might have eventually transferred to the Iranian or Sudanese governments, the proposed transaction would have been problematic under the fourth criterion.[91] In addition, the transfer of any other sensitive technology to China could have been problematic under the fifth criterion because it might have undermined U.S. technological leadership in an area affecting national security.[92] However, the fact that CNOOC offered to divest certain assets from the deal to secure presidential approval for its bid nullified these concerns in this instance.[93] If CNOOC was willing to forego acquiring the problematic equipment, then there would be no cause for concern under the fourth and fifth criteria.

An analysis of these statutory criteria for presidential blockage pursuant to the Exon-Florio Amendment and the CATIC-MAMCO situation undermines the argument that CNOOC's bid to purchase Unocal warranted prohibition based on the House Resolution 344 arguments. Consistent and accurate decisions under this Amendment are vital due to the importance of foreign direct investment to the U.S. economy.[94] Commentators argue that the advantages of such

90. *See* H.R. Res. 344 (stating that "the national security of the United States is threatened by the export of sensitive, export controlled, and dual-use technologies to [Sudan and Iran]"). Note that the Resolution did not argue that national security would be threatened merely by allowing the Chinese to possess these items. *See id.*

91. Such transfers would be sales of military goods to a country identified by the Secretary of State as a country that supports terrorism in violation of § 2170(f)(4)(A)(i).

92. However, an argument can be made that such transfers would not be problematic because many countries in the world are engaged in this business—many to a far greater extent than the United States—and probably already have access to such equipment. *See CNOOC Drops Bid*, *supra* note 65 (noting that at the time of the proposed transaction, Unocal was not even in the top forty oil companies in the world); U.S. Department of Energy, *supra* note 68 (noting that the United States imports most of the oil it consumes).

93. *See* Lohr, *supra* note 13. This offer is consistent with China's increasing demand for oil and other resources to supply its industrialization. *See supra* notes 9, 41 and accompanying text. Indeed, much of the Resolution itself focused on China's rapidly increasing oil consumption and projected rise in demand. *See* H.R. Res. 344. If the Chinese were primarily interested in obtaining Unocal's oil reserves, it seems unlikely that they would chance the bid's success on acquiring some sensitive equipment owned by Unocal.

94. The United States has historically welcomed such investment. *See* Joseph E. Reece, *Buyer Beware: The United States No Longer Wants Foreign Capital To Fund Corporate Acquisitions*, 18 DENV. J. INT'L L. & POL'Y 279, 282–85 (1990) (discussing the historic importance of foreign investment in the United States). Alexander Hamilton stated that foreign investment "ought to be considered as a most valuable auxiliary, conducing to put into motion a greater quantity of productive labor, and a greater portion of useful enterprise than could exist without it." *Id.* at 279 (quoting 3 ANNALS OF CONG. 994 (1791)).

investment include job creation, increased real estate values, land preservation, and improved local economies, among others.[95] Pursuant to this encouragement of foreign direct investment, U.S. trade policy has traditionally encouraged such investment.[96] Major incentives for investment in the United States include the relatively little restriction placed on foreign investment compared to other countries[97] and U.S. political stability with regard to trade policy.[98]

While the Exon-Florio Amendment can be vital to protecting national security when used properly, arbitrary use can actually detract from the advantages of foreign direct investment in the U.S. economy. Arbitrary application of the Amendment slows down the acquisition process, makes direct investment in the United States economy somewhat risky, and creates the potential for divestiture of completed deals.[99] This could mire a prospective deal in uncertainty, making it unprofitable or not worth the effort of the foreign investor.[100] The lack of a consistent definition of national security makes foreign direct investment in light of Exon-Florio even more uncertain.[101] Furthermore, a foreign investor whose bid was improperly blocked has no available recourse in the courts because presidential actions under the Amendment are not subject to judicial review.[102] Creating such a potentially unfriendly environment for foreign direct investment could ultimately decrease such investment

95. Shearer, *supra* note 49, at 1751 (discussing the "devastating potential of Exon-Florio").

96. *See, e.g.*, 19 U.S.C. § 2901(b)(11)(A) (2000) (stating that the principal negotiating objectives of the United States regarding foreign direct investment are to reduce or eliminate barriers to such investment and to develop rules that will help ensure a free flow of foreign investment).

97. Turner, *supra* note 48, at 708–09 n.42 (comparing government restrictions on foreign investment in the United States with those of other major economies).

98. *See* Shearer, *supra* note 49, at 1749–51 (noting expert assertions that the incentives for investing in the United States include a well-developed infrastructure, extensive transportation networks, and political stability).

99. *See supra* notes 24–31 and accompanying text (describing Exon-Florio's ninety-day timeline for final presidential decisions, lack of definite application criteria, and the fact that the President can order divestiture when the parties have already completed the acquisition).

100. *See* Turner, *supra* note 48, at 739 (arguing that due to Exon-Florio's effects on the foreign investor, strict use of the Amendment can contribute to a decline in the U.S. economy).

101. *See* Shearer, *supra* note 49, at 1768. Shearer argues that the vague definition of "national security" creates three major problems: (1) it gives the President substantial discretion to control the flow of foreign investment in the United States; (2) it imposes uncertainties for foreign investors structuring acquisitions involving U.S. companies; and (3) it creates the possibility that many potentially threatening foreign acquisitions will escape scrutiny by the CFIUS. *Id.* at 1765–69.

102. 50 U.S.C. app. § 2170(e) (2000).

as foreign buyers flock to countries where they feel they may have a greater chance of success.

The Chinese reaction to the Unocal purchase bid failure illustrates some of these concerns. CNOOC released the following statement shortly after announcing its decision to pull its bid:

> The unprecedented political opposition that followed the announcement of our proposed transaction . . . was regrettable and unjustified . . . . This political environment has made it very difficult for us to accurately assess our chance of success, creating a level of uncertainty that presents an unacceptable risk to our ability to secure this transaction.[103]

The chief information officer of Falcon Power, a Beijing-based energy consulting firm, echoed this sentiment by stating that "[t]he way the U.S. government has treated CNOOC and politicized the deal will largely frustrate Chinese companies. The companies not only in oil but all other industries will not want to play the game by the U.S. rules."[104] Experts believe this situation could lessen Chinese interest in future investment and make the Chinese less cooperative with U.S. initiatives in the future.[105]

In addition to illustrating the effects of arbitrary use of Exon-Florio on foreign direct investment, the CNOOC-Unocal situation also demonstrates the adverse effects of losing such investment on U.S. shareholders and employees. In this instance, Unocal's shareholders lost at least $1.5 billion in profit from the failure of the CNOOC deal.[106] Some Unocal employees may lose their jobs. While CNOOC pledged to retain the jobs of substantially all of Unocal's employees (including U.S. employees),[107] Chevron promised cost savings of $325 million from the merger, which will include job losses.[108]

Although the threat of an Exon-Florio block in the CNOOC-Unocal situation may not have been wise in light of these repercussions, there were still legitimate concerns surrounding the

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103. Press Release, *supra* note 14.

104. Barboza & Sorkin, *supra* note 1 (quoting Han Xiaoping).

105. White, *supra* note 9.

106. *See id.* (noting that Unocal accepted Chevron's $17 billion cash and stock bid, while CNOOC's final bid stood at $18.5 billion cash). CNOOC's officers considered raising their bid closer to $20 billion, but were reportedly reluctant to do so because of resistance in Washington. Barboza & Sorkin, *supra* note 1.

107. Letter from Fu Chengyu, Chairman & CEO, CNOOC Ltd., to Members of Congress (June 27, 2005) (on file with the North Carolina Law Review).

108. *CNOOC Drops Bid*, *supra* note 65.

proposed Unocal purchase. CNOOC's proposed acquisition of Unocal likely did not present a threat to national security, but the fact that the Chinese government owned a majority share of CNOOC was a valid cause for concern. This concern is more of an economic than a national security issue: government majority ownership of foreign investors may threaten the economic interests of the United States by introducing a powerful, state-backed company into the competitive, private free-market U.S. economy.[109]

A similar situation arose in 1992 when Thomson-CSF, a French defense and aerospace firm in which the French government had a fifty-eight percent ownership stake, made a $450 million bid to acquire the missile and aerospace divisions of LTV Corporation, a financially struggling U.S. defense conglomerate.[110] The next closest bid was $385 million from the Vought Corporation, a U.S. company.[111] The bankruptcy court overseeing the LTV proceeding accepted the Thomson bid,[112] but the proposal encountered significant political opposition in the United States.[113] This opposition was based on three concerns.[114] First, some worried that the transfer of LTV's sensitive technology to France and then to more hostile countries could compromise national security.[115] The second concern was the vulnerability of American defense companies to foreign

109. *See* Matthew D. Riven, Recent Development, *The Attempted Takeover of LTV by Thomson: Should the United States Regulate Inward Investment by Foreign State-Owned Enterprises?*, 7 EMORY INT'L L. REV. 759, 767–69 (1993) (discussing the impact of foreign state-owned or subsidized companies competing in the U.S. free market economy).

110. *See In re* Chateaugay Corp., 198 B.R. 848, 850–51 (S.D.N.Y. 1996). Contracts with the U.S. military constituted ninety-eight percent of the missile division's revenues. *Id.* at 850.

111. *Id.* at 850–51 (noting that the Vought Corporation was a joint venture formed by subsidiaries of the Martin Marietta Corporation and the Lockheed Corporation—both U.S. companies).

112. *Id.* at 852. The court accepted the Thomson bid after Thomson offered to pay LTV a $20 million reverse breakup fee if the bid failed due to an inability to acquire the required U.S. government approvals. The break-up fee was the issue between the litigants in this case. *Id.* at 849–50.

113. *Id.* at 852–54. On July 2, 1992, the Senate voted ninety-three to four in favor of a nonbinding resolution declaring that the proposed sale would be "detrimental to the national security interests of the United States." Steven Pearlstein, *Opposition to LTV Bid Intensifies; Congress, Bush Panel Fault Thomson Deal*, WASH. POST, July 3, 1992, at F1. The House of Representatives started work on a military spending bill that would have barred the Pentagon from granting contracts to the LTV aerospace and missile divisions if they were acquired by a foreign interest. *Id.*

114. *In re Chateaugay Corp.*, 198 B.R. at 852 n.5.

115. *Id.* LTV representatives testified before the bankruptcy court that as much as seventy-five to eighty percent of the company's revenues came from contracts requiring access to classified Communications Security Information. *Id.* at 851.

takeovers.[116] The final concern was "the potential inability of American firms to compete with Thomson given its suspected subsidization by the French government."[117] This final issue is analogous to the economic concerns in the CNOOC-Unocal situation.

Just as concern existed over Vought's ability to compete not only against Thomson, but also against French government subsidies,[118] there were concerns about Chevron's ability to compete against CNOOC, backed by the Chinese government. *The Economist* noted that "[f]irms that are directly or indirectly state-owned have access to the vast resources of the Chinese state. Even those that are nominally independent can obtain loans that are virtually interest-free from state-owned banks."[119] CNOOC would have drawn $7 billion from the Chinese government, and another $6 billion in low-interest loans from state banks if its bid succeeded.[120] This helps explain why CNOOC was able to top Chevron's initial bid by almost $2 billion.[121]

Although the financial advantage of investors backed by foreign governments is a valid concern, this Recent Development's earlier analysis illustrates that Exon-Florio is ill-suited to address this type of economic issue. The Conference Report for the Exon-Florio Amendment supports this argument.[122] The original House bill proposed an investigation "to determine the effects on national security, essential commerce, and economic welfare of mergers, acquisitions . . . and takeovers by or with foreign companies which involve U.S. companies engaged in interstate commerce."[123] The Senate amendment retreated somewhat from this language in calling for investigation of the proposed acquisition's effect on "national

116. *Id.* at 852 n.5.

117. *Id.*

118. *See* Steven Pearlstein, *Carlyle Group, French Firm Win LTV Bid; Judge Accepts Offer for Aerospace Division*, WASH. POST, Apr. 11, 1992, at C1 (quoting the Chairman of Martin Marietta, Norman R. Augustine, questioning how his corporation could outbid a firm that had the French government's financial resources behind it); Steven Pearlstein, *Undoing a Done Deal; How a Few Key Days Broke Marietta's Grip on LTV Aerospace*, WASH. POST, Apr. 19, 1992, at H1 (quoting Chairman Augustine as stating that "[t]hey were using the French Treasury to buy a position in the U.S. market").

119. *CNOOC Drops Bid*, *supra* note 65.

120. *See id.*

121. *See supra* text accompanying notes 7–8.

122. *See* H.R. REP. NO. 100-576, at 924–27 (1988) (Conf. Rep.), *as reprinted in* 1988 U.S.C.C.A.N. 1547, 1957–60 (including the proposed applicability of the Exon-Florio Amendment in the House bill, changes made in the Senate amendment, and the final Conference agreement).

123. *Id.* at 1957.

security, or essential commerce which relates to national security."[124] The Senate version qualified the consideration of essential commerce and deleted the reference to economic welfare. The Conference agreement and final version of the Amendment retreated from the House language even further. The prime consideration in the final version is whether the foreign entity may take any action that "threaten[s] to impair the national security."[125] These changes indicate that Congress considered and ultimately rejected Exon-Florio's applicability to strictly economic concerns.[126]

Unfortunately, these economic concerns will not simply go away. China's continuing rise in the international economy indicates that problems similar to those in the CNOOC-Unocal bid will likely recur. This Recent Development has argued that invoking the Exon-Florio Amendment to neutralize these economic concerns is not consistent with the original intent and design of the Amendment and may lead to long-term economic repercussions. Some changes in the existing review framework may be required to address these concerns.

The first concern illustrated by the CNOOC-Unocal purchase bid that must be addressed is the problem of foreign direct investment by state-owned firms. An alternative solution to using the Exon-Florio Amendment in these cases would be to use a committee similar to the CFIUS to conduct reviews of the economic implications of allowing a foreign state-owned corporation to acquire a domestic firm. In much the same way that Exon-Florio gives the President a means for conducting national security reviews of foreign direct investment,[127] Congress can include the additional task of reviewing such investment for anti-competitive practices and related issues.[128] This statutory delegation could establish a limit on the degree to which a foreign firm seeking to invest in the United States could be controlled by its home government. If government control exceeds this limit, the reviewing committee could recommend that the President block the transaction if the committee finds that the transaction threatens U.S. economic welfare. The telecommunications field provides precedent for such a provision.

124. *Id.* at 1938.

125. *Id.* at 1573; *see also* 50 U.S.C. app. § 2170(e)(1) (2000).

126. Members of the Reagan administration played a significant part in convincing Congress to remove any consideration of "essential commerce." *See* Robinson, *supra* note 17, at 183. Officials at the Departments of Commerce and Treasury and the U.S. Trade Representative all lobbied against any consideration of essential commerce. *Id.*

127. *See supra* notes 18–20 and accompanying text.

128. *See* Riven, *supra* note 109, at 778 (arguing that the "CFIUS ought to apply a standard that protects competition").

The Telecommunications Act of 1996[129] permits the Federal Communications Commission to refuse to grant or to revoke a license to a telecommunications company if any foreign entity (government-owned or not) has more than a twenty-five percent controlling interest in the company.[130]

The second concern illustrated by the CNOOC-Unocal purchase bid is the problem of arbitrary use of Exon-Florio where such use would be economically expedient. Exon-Florio's vague guidelines for determining what constitutes a threat to national security[131] make it a readily-available weapon in circumstances like the present case, where the primary fears revolved around oil supply and economic considerations rather than traditional national security concerns. Such use of Exon-Florio creates significant uncertainty by giving potential foreign investors very little indication of whether their proposed investments will be considered a national security threat.[132] To address this problem, Exon-Florio's applicability should be more precisely defined, thereby giving investors a better idea of their investment's chances for success.

A sensible first step would be to define more specifically the term national security to include clearer guidance on where national security is and is not implicated. This guidance would have to be specific enough to give potential foreign investors a reasonable basis to judge their proposal's chances for success, while still preserving adequate discretion for the President to make a decision based on all available circumstances. One proposal would provide that the foreign ownership or control of a U.S. company that supplies an essential product poses a threat to national security only where the U.S. company is one of very few suppliers of the product, the amount of time to develop the product in the United States is unreasonably long, and there is no adequate means to stockpile the product.[133] Such a criterion would give a company like CNOOC a reasonable basis for determining its chances of success in an Exon-Florio review, while still providing significant discretion to the President.

Congress is already taking steps to address the issues arising from the CNOOC-Unocal situation. On September 29, 2005, Senator

129. Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified as amended in scattered sections of 47 U.S.C.).

130. *See* 47 U.S.C. § 310(b)(4) (2000) (stating that the FCC may revoke or refuse to grant a license if it finds that "the public interest will be served by the refusal or revocation of such license").

131. *See supra* notes 31–34 and accompanying text.

132. *See* Shearer, *supra* note 49, at 1768.

133. *See* Turner, *supra* note 48, at 736–37.

James Inhofe introduced a bill that would add a sixth Exon-Florio criterion that the President could consider in determining whether or not to block an acquisition on national security grounds. The proposed Foreign Investment Security Act of 2005[134] suggests that the President consider "the long-term projections of United States requirements for sources of energy and other critical resources and materials and for economic security"[135] in addition to the existing five criteria. While this addition would help companies like CNOOC realize they may encounter problems in their bids to purchase U.S. companies, it does not provide the level of specificity suggested by this Recent Development.

The inevitability that a situation similar to that presented by the CNOOC-Unocal bid will arise again at some point in the near future requires that the United States have a coherent plan to implement. Such a plan must protect domestic national security while encouraging foreign faith in the open and consistent investment policies of the United States. This is the best way to walk the line between encouraging foreign direct investment and vigilantly guarding against future threats to national security.

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134. S. 1797, 109th Cong. (2005).
135. *Id.* § 2(3)(D).